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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-646

SYSTEM COUNCIL T-4, COMPRISED OF LOCAL UNIONS 134, 165, 315, 336 AND 399 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, System Council T-4 Comprised of Local Unions 134, 165, 315, 336 and 399 of the International Brotherhood of Electrical Workers, AFL-CIO, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a decision of the National Labor Relations Board which found that the Illinois Bell Telephone Company had not engaged in conduct in violation of Sections 8(a)(1) and 3(a)(3) of the National Labor Relations Act, Title 29, U. S. C. Sections 158a.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported as *System Council T-4, Comprised of Local Unions 134, 165, 315, 336, and 399 of the International Brotherhood of Electrical Workers, AFL-CIO,* at 446 F. 2d 815. It is also printed in the Appendix to this Petition. (App. A3)

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit affirming the order of the National Labor Relations Board was entered July 19, 1971. (App. A2) A timely Petition for Rehearing was denied on August 11, 1971. (App. A1) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where employees are entitled to fringe benefits under an existing collective bargaining agreement by the maintenance of their employer-employee relationship, is not the employer's denial of pension, vacation and other fringe benefits to striking employees a discrimination in terms and conditions of employment in violation of the National Labor Relations Act.

2. Does an employer's statement issued to its striking employees, which, on its face warns of loss of benefits to those employees who continue on strike, constitute a threat in violation of the National Labor Relations Act, and constitute conduct which is inherently destructive of employees' rights sufficient to shift the burden to the employer to require that a legitimate business justification for such conduct be presented.

STATUTE INVOLVED.

Title 29, United States Code, Section 158.

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or termi-

nated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

STATEMENT OF THE CASE.

Illinois Bell and the Petitioner, at times material, were parties to a collective bargaining agreement (G. C. Exh. 2; Tr. 6).[1] On May 8, 1968, the employees represented by Petitioner began a strike against Illinois Bell. This strike was concluded on or about September 23, 1968. Approximately 11,800 employees in units represented by the Petitioner were involved in this strike (Tr. 11-12). On June 4, 1968, Illinois Bell mailed to its employees in units represented by the Union a document entitled "Important Message to All Employees": This document stated,

> If you have been off the job on an unpaid absence, you should know it is a long-standing company practice to adjust an employee's net credited service date whenever the number of unpaid days of absence exceeds 30 consecutive days. (Service dates are important in computing such things as vacation allowances, benefits, pension dates, and other items.)
>
> If any employee who has not been reporting for work because of strikes does report for work by June 6, 1968, no adjustment in the service date will be made. But under this practice, any employee who has been absent because of strikes and who does not report for work by June 6 will have his service date adjusted by the number of unpaid consecutive days absent in excess of 30.
>
> All unions representing Illinois Bell employees have been reminded of this practice and advised that this information is being distributed to all employees.
>
> ILLINOIS BELL TELEPHONE COMPANY.

1. "G. C. Exh." refers to the General Counsel Exhibit in the National Labor Relations Board proceedings below. "Tr." refers to the transcript of that proceedings. Certified copy of the transcript and exhibits has been filed with the Court.

The practice referred to in this June 4 message to employees is not stated in General Counsel's Exhibit 2, the collective bargaining agreement relevant to this proceeding (Tr. 7-8).

The collective bargaining agreement between the respondent company and the unions (GC Ex. 2) was in effect during the entire period of the strike. (Tr. 6 and 84)

Prior to the strike, the company determined an employee's seniority by his service date. (Tr. 14, 18, 36 and 37, and GC Ex. 3) However, the company decided that after the strike an exception would be made to the previous policy. (Tr. 36) The company did not follow the contract provisions or past company practice regarding vacation time being considered as work time, even though the contract was in effect during the time of the strike. (Tr. 71 through 84)

The contract provides that employees will receive vacations in varying amounts based upon the employee completing months or years of service. (Article XX, Section 1 of GC Ex. 2) The contract provides that no change which would reduce or diminish the pension or disability benefits of employees, will be made without the consent of the Union. (Article XXIV of GC Ex. 2) The Union refused to allow the company to add language to the collective bargaining agreement, Article XXI regarding adjustment of the net credited service date because of strike time. (Tr. 95 and 96 and 112)

The company actually made changes on the employees' personnel records to adjust the net credited service date due to absence on strike. (Tr. 56-59; Charging Party Ex. 1, 2, 3, and 4)

The change of the net credited service date affected length of vacations, pension eligibility, sick disability benefits, termination payments and telephone concessions. (Tr. 43-45; Respondent Exhibit 1)

REASONS FOR GRANTING THE WRIT.

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit in this case for the following reasons:

1. The Court of Appeals founded its decision upon the rationale that there is a distinction between seniority rights, which are accrued as a result of years of service, and other fringe benefits such as pension, vacation, and related benefits which, it said, arise from actual work performed. This theory was evolved by the National Labor Relations Board in its decision of *General Electric Co.*, 80 NLRB 510. By reaffirming the *General Electric* decision, the Circuit Court has failed to recognize that pensions, vacations, and all other fringe benefits are predicated upon the maintenance of the employer-employee relationship under circumstances that provide for the continuation of such rights.

The entitlement to fringe benefit continuation has been recognized by this Court in its decisions in *Erie Resistor Corp.*, 373 U. S. 221, *Great Dane Trailers, Inc.*, 388 U. S. 26, and *Fleetwood Trailer Co.*, 389 U. S. 375. Where, as here, the collective bargaining agreement of the employees, who engaged in the strike, continued in effect throughout the terms of the strike, the employees were entitled to all fringe benefits which resulted from the continuation of the employer-employee relationship.

The deprivation of these benefits is discrimination in the terms and conditions of employment because it is inherently destructive of the employee's right to engage in a strike. *Erie Resistor Corp., supra.*

This presents a serious question which has not been, but should be decided by this Court.

2. The Court below found that the employer's state-

ment to the employees, that it was going to diminish their fringe benefits if they remained on strike, was insufficient to amount to a threat because the employer had the right to give a warning of intent to do that which it was legally entitled to perform.

However, it is, and has been, this Court's holding that conduct which has a tendency to inherently discourage union activity is a threat within the meaning of the Statute. *Radio Officers* v. *Labor Board,* 347 U. S. 17.

In addition, this Court has held that a valid business purpose must exist for any action by an employer which has a discouraging effect upon the employee's present or future concerted activity. *Great Dane Trailers, Inc.,* 388 U. S. 26.

The rationale of the *Great Dane* decision of this Court has been interpreted by the Circuit Court of Appeals for the Second Circuit to apply to a situation which would be a threat under Section 8(a)(1) of the Statute as well as discrimination under Section 8(a)(3). *Tex Tan Welhausen Company,* 419 F. 2d 1265.

This Court should grant review of this matter because of the conflict between the decision below and this Court's decisions, and because of the split between the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals.

I.

The fundamental error of the Court of Appeals, as with the National Labor Relations Board before it, is that an attempt is made to distinguish between the benefits which arise from an employee's continuation in the employer-employee relationship under a valid collective bargaining agreement. The Circuit Court's purported distinction between what has been called seniority on the one hand,

and benefits related to work performed on the other hand, is a result of the Board's decision in the *General Electric Company* case, 80 NLRB 510. However, the *General Electric* decision by the Board was erroneous as a matter of law when issued, and has resulted in a patchwork of decisions which have attempted to reconcile the purported distinction between categories of employee's rights where no real difference exists.

The error that an employee's right to seniority is different in nature from the employee's right to other fringe benefits, such as pension and vacations, has resulted in the evolution of theories such as the "active work" theory and the "years of service" theory, in order to ascertain if there is an accrued right to fringe benefit entitlement. However, it is clear that the attempts to distinguish between accrued versus future fringe benefits entitlement is a fiction.

This Court, in its decisions of *Erie Resistor, supra, Great Dane, supra and Fleetwood, supra,* emphasize the employer-employee relationships as the basic source of employee rights. Since the employer and employee relationship is the source of all employee rights under a collective bargaining agreement (or even in the absence of one), then a continuation of that relationship must result in the entitlement to such benefits.

The original error of the Labor Board was its failure to recognize this source of employee rights. In the *General Electric* case it found the company, there, guilty of violating the statute by having an improper motivation in that it attempted to discriminate against its employees by moving of the service date. The Board in that case held that deferred benefits like retirement and vacation benefits are a form of wages citing *Inland Steel Co.,* 77 NLRB 1.

From this very general equating of deferred benefits to wages, as allegedly set out in the *Inland Steel* case,

the Board reasoned that an employer need not pay such benefits as vacation and pension to strikers. However, in the *Inland Steel* case, *supra,* the Board stated that not only are pensions and vacations like wages, but that they are also within the scope of other conditions of employment.

The Seventh Circuit Court of Appeals, in enforcing the Board's order requiring that Inland Steel bargain with the union, concerning pensions in particular, stated that it found the Board's rationale that retirement and pension plans are conditions of employment to be sound and specifically affirms that aspect of the decision, *Inland Steel* (1948), 170 F. 2d at 250 and 251.

Thus the Board, in the *General Electric* case, merely seized upon one of the two relevant aspects considered by both the Board and the Circuit Court in its affirmation of the *Inland* decision. That error is seen from the Seventh Circuit's statement that it did not dispute Inland Steel's contention that the pensions paid to employees are in reality a payment for an employee's living up to the condition of maintaining the employee relationship for the requisite number of years.

However, even if the theory postulated in the *General Electric* case were valid when written, subsequent events, embodied in the statutory amendments enacted by Congress and the decisions of this Court, most notably *Great Dane* and *Fleetwood* and *Erie Resistor,* have shown the error of the previous theory. Following the issuance of the *General Electric* decision, Congress added Section 9(c)(3) to the National Labor Relations Act. The section guaranteed to economic strikers the right to retain an interest in their employment.

This Court, in *Erie Resistor,* in part, relied upon that amendment to uphold the Board's ruling that an employer may not grant superseniority to strike replace-

ments. Carrying on this theory, this Court in the *Fleetwood Trailer,* reasoned that an employee under Section 2(3) of the Act continues to be an employee unless he has obtained regular and substantially equivalent employment elsewhere, after having gone on strike. This Court has clearly followed the Congressional intent in recognizing that strikers maintain their employer-employee relationships and continue to be entitled to all of the rights and benefits derivative therefrom.

This Court's rationale in the *Erie Resistor, Great Dane* and *Fleetwood* cases is predicated upon the concept that an employee's total service rendered to an employer should result in benefits arising from that relationship. Thus an employee who has pledged his life's work to the employer is necessarily entitled to vacations and a pension, based upon his total employment. To conclude, as did the Court of Appeals and the Board, that the employer may limit the amount of vacation or pension rights of an employee because he went on strike and credit him only for the total actual work performed, is to forget that these rights emanate from the entire term of employment, and the offering of one's total life work rather than hours and minutes of service.

II.

The Court of Appeals concluded that no threat resulted from the Employer's message to the striking employees because it was merely a warning of the intent to make adjustments in the employees' net credited service date. Since the Court found that the adjustment of the net credited service date was not discrimination then it concluded that there could be no threat to give the warning of its intention to engage in conduct the Court found permissible.

The Court adopted the theory of the majority of the Labor Board that there is a distinction between seniority

and net credited service. As was argued above, no such distinction should be made because all employee rights are predicated upon the maintenance of the employer-employee relationship.

As was argued by the Petitioner below, there is no necessity for proof that the employer had the specific intent to threaten or restrain or coerce its employees when it issued the memo of June 4th. This Court has long recognized that the specific proof of such intent is unnecessary where the employer's conduct inherently discourages union activities. *Radio Officers* v. *Labor Board* (1954), 347 U. S. 17, 45 *et seq.* This Court made it perfectly clear that an employer may not hide behind the fact that there is no proof of intent to discourage union activities as long as the natural consequences of his actions result in the discouragement of union activity. This basic principle has been applied numerous times by this Court and many Court of Appeals.

The decision of the Court of Appeals fails to mention this Court's decision in the *Radio Officers* case, *supra,* in spite of the citation of that Court's recent decision which applied the rationale to a situation similar to the instant case. (See *NLRB* v. *Darling and Company,* 420 F. 2d 63) The propriety of this Court's decision in *Radio Officers, supra,* is beyond question.

More importantly, the Circuit Court's decision failed to recognize that the Employer is under an obligation to come forward with a legitimate business explanation for any of its conduct which inherently discourages union activities. *Great Dane Trailer, supra.* As the record now stands, there is absolutely no legitimate explanation for the sending of the June 4 message to the employees.

The Court of Appeals for Fifth Circuit has held that this shifting of the burden of proof to the employer occurs

whether the conduct violated Section 8(a)(3) as discrimination or Section 8(a)(1) as restraint. *Tex Tan Welhausen Company,* 419 F. 2d 1265 (at 1271). Thus, the Circuit Court's failure to apply the *Great Dane* criteria has placed it in direct conflict with the Fifth Circuit.

Of even greater significance, the Circuit Court's adoption of the reasons set forth by the Trial Examiner and the majority of the Labor Board for finding no violation has resulted in the shifting of the burden of proof to the employees and the Petitioner. Therefore, instead of applying this Court's *Great Dane* decision to the employer, the Circuit Court has made a perverted application of the rationale of that case to the Petitioner, and to the employees that it represents. The decision below is in direct conflict with the *Great Dane* decision of this Court.

CONCLUSION.

Wherefore, for the above and foregoing reasons petitioners pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago, Illinois 60604.

Wednesday, August 11, 1971.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 18161

SYSTEM COUNCIL T-4, Comprised of Local Unions 134, 165, 315, 336 and 399, of The International Brotherhood of Electrical Workers, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the National Labor Relations Board.

IT IS ORDERED by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.

APPENDIX B.

UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.

July 19, 1971

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 18161 SYSTEM COUNCIL T-4, Comprised of Local Unions 134, 165, 315, 336 and 399, of The International Brotherhood of Electrical Workers, AFL-CIO, *Petitioner,* *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Petition to Review and Set Aside an Order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that/the decision of the Petition to Review and Set Aside the National Labor Relations Board entered in this cause on November 24, 1969 be, and the same is hereby, DENIED.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1970 APRIL SESSION, 1971

No. 18161
SYSTEM COUNCIL T-4, Comprised of Local Unions 134, 165, 315, 336 and 399, of The International Brotherhood of Electrical Workers, AFL-CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the National Labor Relations Board.

July 19, 1971

Before SWYGERT, *Chief Judge,* STEVENS and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This is a petition to review and set aside an NLRB order[1] dismissing a complaint issued after unfair labor charges by System Council T-4 ("Union") against the Illinois Bell Telephone Company. We deny the petition.

1. The Board's order is reported at 179 NLRB No. 119 (1969).

I.

The Union first charges the Company with a violation of Section 8(a)(1) of the National Labor Relations Act.[2] Approximately 11,800 employees in units represented by the Union went out on strike on May 8, 1968, in support of economic demands during contract negotiations. On June 4, the Company mailed to its employees this document, entitled "Important Message to All Employees":

> If you have been off the job on an unpaid absence, you should know it is a long-standing Company practice to adjust an employee's net credited service date whenever the number of unpaid days of absence exceeds 30 consecutive days. (Service dates are important in computing such things as vacation allowances, benefits, pension dates, and other items.)
>
> If any employee who has not been reporting for work because of strikes does report for work by June 6, 1968, no adjustment in the service date will be made. But under this practice, any employee who hase been absent because of strikes and who does not report for work by June 6 will have his service date adjusted by the number of unpaid consecutive days absent in excess of 30.
>
> All unions representing Illinois Bell employees have been reminded of this practice and advised that this information is being distributed to all employees.

The trial examiner, whose findings were adopted by the Board, found that under the parties' collective bargaining agreement and practice the "net credited service" referred to in the message determines length of vacations and entitlement to pensions, sick benefits, termination pay, and telephone concessions. Seniority, on the other hand, affects choice of vacation time, promotion eligibility, choice of hours, and order of layoff and recall. The Union

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2. U. S. C. § 158(a) states: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ."

concedes that the Company never did advance the seniority date of any striker. But the Union alleges that the June 4 message, by warning of an adjustment in the net credited service date, contained a threat to affect the strikers' seniority. Its argument is based on the fact that, prior to May 8, an employee's net credited service date usually coincided with his seniority date. A threat to halt accumulation of seniority during the remainder of the strike, the Union states correctly, would restrain employees in violation of Section 8(a)(1). *See NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963); *Swarco, Inc.* v. *NLRB*, 303 F. 2d 668, 672 (6th Cir. 1962); *cert. denied*, 373 U. S. 931 (1963).

In deciding that the June 4 letter did not threaten loss of seniority, the trial examiner relied primarily on the language of the message, which mentions only net credited service and not seniority. He noted that the letter accurately stated which benefits would be affected by a change in service date. We agree with the examiner's construction of the letter and believe that the following facts cited by him support his conclusion:

(1) Personnel records were available for employees to check for variances between seniority and service dates. (2) Later in the strike, the Company made clear its policy not to adjust seniority dates and offered to incorporate an assurance to that effect in the new collective bargaining agreement. (3) There was no evidence that the letter had any impact on the effectiveness of the strike. (4) The Union could have clarified the significance of the letter if its members had been confused; it did not attempt to do so. The Union points to the paucity of proof that the Company's practice as set forth in the message was in fact "long-standing," and to the fact that the Company had never before communicated its practice to its employees, but these faults are easily explained—no strike against Illinois Bell had ever lasted more than 30 days.

There is substantial evidence in the record to support the Board's findings. *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951); *NLRB* v. *Walton Mfg. Co.,* 369 U. S. 404 (1962).

We therefore conclude that the June 4 message did not threaten the strikers with loss of seniority. Of course it did tell the strikers that their net credited service dates would be adjusted if they remained on strike for more than 30 consecutive days. But since the adjustment itself was lawful, as we hold below, the warning of intent to make the adjustment does not violate Section 8(a)(1). *Kansas Milling Co.* v. *NLRB,* 185 F. 2d 413, 420 (10th Cir. 1950).

II

The Union's second charge is that the Company, in moving ahead the strikers' net credited service dates, violated Section 8(a)(3)[3] by discriminating against those employees who remained on strike more than 30 consecutive days.

Before reaching the merits of this charge, we must consider the Company's contention that the Board should not have entertained the 8(a)(3) charge because it was not stated plainly in the complaint.[4] The complaint alleged that the Company denied service credit for the period of the strike after June 6 (para. V), and that such act discriminated against its employees in violation of Section 8(a)(3) (para. IX). We believe the complaint was broad enough to encompass the Union's charge of discrimination

3. 29 U. S. C. § 158(a) states: "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

4. General Counsel for the NLRB seems to have abandoned the 8(a)(3) charge during the hearing, but the Union continued to press it.

in the adjustment of the service date. *See Frito Co.* v. *NLRB,* 330 F. 2d 458 (9th Cir. 1964). Thus the substantive issue is properly before us.

The Union's argument begins with *General Electric Co.,* 80 NLRB 510 (1948), which held that an employer could not suspend the accumulation of seniority during a strike, but could halt the accrual of vacation and pension benefits. The Board reasoned that, because vacation pay and pensions are a form of deferred benefits,[5] and because an employer is not required to remunerate strikers for work not performed, denial of such benefits does not discriminate against the strikers. Under *General Electric,* the adjustment of the net credited service date does not violate Section 8(a)(3).

The Union contends that subsequent Supreme Court cases undermine the rationale of *General Electric,* so that whenever an employer discriminates against any employee rights, he must establish that his motive was not anti-union. *See NLRB* v. *Great Dane Trailers, Inc.,* 388 U. S. 26 (1967); *NLRB* v. *Fleetwood Trailers Co., Inc.,* 389 U. S. 375 (1967).

A review of "fringe benefits" cases since *General Electric* shows that there are two major categories of benefits an employer may not withhold from striking employees under Section 8(a)(3). The first category includes any benefit which will give a nonstriking employee a preferred position over a striker on a long-term basis. These benefits are not in the nature of compensation for work performed; they are systems which give one employee priority over another in choosing hours or vacation times, or in setting an order for layoffs or promotions. Examples of these cases are *NLRB* v. *Erie Resistor Corp.,* 373 U. S. 221 (1963) (giving "super-seniority" to replacement and returning strikers as insurance against

5. *Inland Steel Co.* v. *NLRB,* 170 F. 2d 247 (7th Cir. 1948), *cert. denied,* 336 U. S. 960 (1949).

future layoffs); *NLRB* v. *Fleetwood Trailers Co., Inc.*, 389 U. S. 375 (1967) (hiring new employees when strikers were available for reinstatement); *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612 (7th Cir. 1970) (rehiring strikers as "temporary" employees).

The other category of benefits an employer may not deny consists of any rights earned by the employee before the strike began. Withholding accrued benefits from strikers is conduct "inherently destructive" of employee rights and is an unfair labor practice unless the employer can prove a legitimate business purpose. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967); *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F. 2d 612 (7th Cir. 1970) (denying accrued vacation payments in both cases); *Tex-Tan Welhausen Co.* v. *NLRB*, 419 F. 2d 1265 (5th Cir. 1969), *vacated on other grounds*, 397 U. S. 819 (1970) (denying all vacation benefits because employees were not at work on December 31 or were absent more than 280 hours, where plan called for percentage payment according to annual salary).[6]

Conduct outside these two categories has never been held to amount to the sort of discrimination condemned in Section 8(a)(3). In *Tex-Tan Welhausen Co.* v. *NLRB*, *supra*, the company was allowed to compute vacation pay as a percentage of annual salary, thus reducing the benefit in proportion to the amount of strike time. The Board in *Mooney Aircraft, Inc.*, 148 NLRB 1057 (1964), *enforced* 366 F. 2d 809 (5th Cir. 1966), found no discrimination where the company, which required one year of work for vacation eligibility, refused to pay vacation benefits to strikers who had not worked a full year when the strike began. Health insurance premiums were called deferred benefits in *Ace Tank and Heater Co.*, 167 NLRB 663 (1967).

6. The fact that the employees were out on an unfair labor practices strike was also a deciding factor in the court's finding of discrimination.

The employer was not required to make premium payments during the strike, but was forced to pay medical expenses incurred after the uninsured striker returned to work.

In *Kimberly-Clark Corp.*, 171 NLRB No. 82 (1968), the Board adopted the thorough analysis of *Great Dane* by the trial examiner, who stated, ". . . I do not regard the decision of the Supreme Court in *Great Dane Trailers* . . . as precluding reliance on the often stated axiom that an employer need not remunerate strikers for work not performed." 171 NLRB No. 82 at 13. He found no discrimination in the company's denial of "service credits" (which served a purpose similar to Illinois Bell's net credited service) during the period of the strike.[7]

We believe the Supreme Court in *Great Dane* and *Fleetwood Trailers* did not intend to overrule *General Electric;* we reaffirm the validity of its distinction between seniority (and the benefits traditionally dependent upon it) and benefits related to work performed. Because the benefits affected by the change in the net credited service dates clearly fall into the latter classification, we find there has been no discrimination to activate the employer-burden rule of *Great Dane.* An employer may not prefer a nonstriking employee over a striker on a seniority list, but a company need not compensate a striker—with wages or deferred benefits—for work not performed.

The Union's petition to set aside the NLRB order is denied.

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7. In *Kimberly-Clark* the examiner mentions a complaint (abandoned by the union during grievance procedures) which is also present in our case: An employee who was hired—for example—in December 1958 and was on strike for five months would have his net credited service date moved forward to March 1959. Instead of being eligible for three weeks' vacation pay in 1968, he would not be eligible until 1969. We consider this result a "comparatively slight" harm to employee rights which the Supreme Court condoned in *Great Dane,* 388 U. S. at 34.

SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1971

No. 71-646

SYSTEM COUNCIL T-4, COMPRISED OF LOCAL UNIONS 134, 165, 315, 336 AND 399 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD and ILLINOIS BELL TELEPHONE COMPANY,

Respondents.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 446 F 2d 815 (Pet. App. 3-9). The decision of the National Labor Relations Board is reported at 179 NLRB No. 119.

JURISDICTION

The petition should be dismissed because it was filed too late. The period allowed by statute ended ninety days after the denial of rehearing below. That day was Tuesday, November 9, and the petition was filed two days later without an excuse. 28 USC 2101(c); *Pittsburgh Towing Co.* v. *Mis-*

sissippi Valley Co., 385 US 32 (1966); *Levine* v. *United States*, 380 US 915, 967 (1965).

QUESTION PRESENTED

Whether the Board and the Court of Appeals abused their discretion in deciding that Illinois Bell had not violated the National Labor Relations Act.

STATEMENT OF THE CASE

This case involves only well-settled law. The Board's General Counsel charged the Company with violating Section 8(a)(1) and (3) of the Act by threatening to change the seniority of certain strikers, and by actually doing so. The pertinent parts of the Act are:

> "Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> > "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > • • •
> >
> > "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

At the hearing it became perfectly clear that the Company had not changed anyone's seniority. The Board's General Counsel thereupon ceased to make any claim under Section 8(a)(3) and confined his case to the relation of Section 8(a)(1) to a company statement of June 4, 1968. Trial Examiner's Decision, footnote 7. The Trial Examiner found that the Company had not violated the Act in any respect. Board Chairman McCulloch and Member Zagoria approved all of the Trial Examiner's decision; Member Brown dissented, but solely with respect to the relation of the company statement of June 4 to Section 8(a)(1). The Court of Appeals unanimously sustained the Board.

Petitioners continue to allege a threat to seniority. But their "fundamental" claim is that the *General Electric* decision in 80 NLRB 510 (1948) should be overruled to require for the first time that days absent on an economic strike must always be counted as if they were days worked for the purpose of fixing the amounts of future fringe benefits. The consequence of their argument would be full pay for all persons on strike.

ARGUMENT

I. THE FINDINGS OF THE NATIONAL LABOR RELATIONS BOARD ARE BASED UPON SUBSTANTIAL EVIDENCE ON THE RECORD AND SHOULD NOT BE REVIEWED BY THIS COURT

Section 10(f) of the Act provides that the Board's findings of fact shall be "conclusive" "if supported by substantial evidence on the record considered as a whole. . . ." Section 10(c) of the Act provides in part that the Board may enter an order against a respondent only "upon the preponderance of the testimony taken. . . ."

There is no claim that any of the Board's procedures were unfair, or that its personnel were biased or unfamiliar with the evidence. The record is adequate, simple and without any conflicts.

II. THE MESSAGE OF JUNE 4 DID NOT VIOLATE THE NATIONAL LABOR RELATIONS ACT

On June 4, 1968, the Company sent a message to all of its employees which is quoted in the opinion of the Court of Appeals. Everyone involved in this case except petitioners agrees that the Company had the right to do exactly what that message said. One of the Board members thought that the message implied a threat to seniority, although that subject was not specifically mentioned in the message. His view

was rejected by the other two members of the Board panel and by a unanimous Court of Appeals. In any event, this issue turns on the particular facts of this case, and is not of sufficient general importance to warrant review by this Court.

The Board specifically found at page 12 of the Trial Examiner's decision in this case that the Company's motive was "a legitimate business interest" and not "anti-union considerations." Petitioners' accusations of discriminatory motives, never having been supported by the requisite prpof or findings, must be rejected. *Radio Officers' Union* v. *NLRB*, 347 US 17 (1954), cited by petitioners on this point, was a case in which the Board reached the opposite conclusion, and is not controlling here.

Petitioners assert a conflict with *Tex Tan Welhausen Co.* v. *NLRB*, 419 F 2d 1265 (5th Cir.), vacated on other grounds, 397 US 819 (1970), enforced as modified, 434 F 2d 405 (5th Cir., 1970), cert. den., 402 US 973 (1971). On the contrary, that case was properly cited by the Seventh Circuit in its opinion as supporting its decision in this case. 446 F 2d at 819. The *Tex Tan* strike was caused by the employer's unfair labor practices, and the workers' vacation rights were "already proportionately reduced for the time the workers were on strike . . . ." 419 F 2d at 1271. Neither the Fifth Circuit nor the Board ever objected to that proportionate reduction because of that strike; they prevented a "further complete forfeiture . . . ." 419 F 2d at 1271.

III. THE COMPANY'S REFUSAL TO COUNT ALL OF THE STRIKE TIME AS "SERVICE" WAS LAWFUL

Petitioners' principal contention is that "strikers maintain their employer-employee relationship and continue to be entitled to all of the rights and benefits derivative there-

from." Pet. Brief, p. 10. "Since the employer and employee relaticnship is the source of all employee rights . . . a continuation of that relationship must result in the entitlement to such benefits." Pet. Brief, p. 8. But these sweeping generalizations prove too much. Petitioners' theory would apply just as fully to paying hourly wages during a strike as it does to increasing a worker's rights to pensions, vacations and other work-connected fringe benefits merely because of the passage of time during a strike. Petitioners' contention was fully answered by the Court of Appeals, particularly in the last paragraph of its opinion. It was also discussed and rejected by the Trial Examiner. His conclusion on that point was accepted by the Board without objection.

The Board has repeatedly held that since strike time is not paid for, it need not be treated as work time in computing the amount of future employer fringe payments such as vacations and pensions. Strikers are not rendering "service"; they are withholding it. *General Electric Co.*, 80 NLRB 510 (1948); *Kimberly-Clark Corp.*, 171 NLRB No. 82 (1968); *Evening News Assn.*, 185 NLRB No. 70 (1970); *Roegelein Provision Co.*, 181 NLRB No. 72 (1970); *Ace Tank Co.*, 167 NLRB 663 (1967).

The courts have consistently held that such rights to fringe benefits from the employer as vacations, pensions and insurance can and should be related to production and wages. *Inland Steel Co.* v. *NLRB*, 170 F 2d 247, 253 (7th Cir.), cert. den., 336 US 960 (1949), enforcing 77 NLRB 1 (1948); *Pittsburgh-DesMoines Steel Co.* v. *NLRB*, 284 F 2d 74 (9th Cir., 1960); *Quality Castings Co.* v. *NLRB*, 325 F 2d 36 (6th Cir., 1963); *Melville Confections, Inc.* v. *NLRB*, 327 F 2d 689, 692 (7th Cir., 1964).

The cases cited by petitioners show that an employer cannot cancel rights which had already accrued when a strike began. *NLRB* v. *Erie Resistor Corp.*, 373 US 221 (1963)

(20 years of super-seniority given to nonstrikers); *NLRB* v. *Great Dane Trailers, Inc.*, 388 US 26 (1967) (accrued vacation benefits paid to non-strikers but denied to strikers); *NLRB* v. *Fleetwood Trailer Co.*, 389 US 375 (1967) (new hires preferred over economic strikers). But the instant case is easily distinguishable. Illinois Bell paid all vacation benefits based on service prior to the strike; the restrictions on service credit for time lost due to strike absence apply only to eligibility for larger benefits payable in future years.

The decisions cited by petitioners were also cases in which the Board exercised its judgment *against* an employer in a particular fact situation, and in which special reliance was placed by this Court on that exercise of judgment. 373 US at 230-3; 388 US at 33-4; 389 US at 378. But in the case at bar the Board and the Seventh Circuit have both exercised their judgment in favor of the employer's position in a case with different facts.

The record shows that "seniority" in this case may affect such matters as the choice of vacation times, the choice of shifts, the sequence of layoffs, and the making of promotions. These are all rights of one employee as against all others, and the Company did not change them. But "service" (which the Company did adjust) is a completely different concept which affects such other and different benefits as the length of vacations, the maximum amount of sickness payments, and the size and starting date of pensions. These are rights of each employee as against the employer. "Seniority" and "service" are dealt with separately in the union contract (G. C. Ex. 2, particularly in Article XXI), and it is important that they be kept distinct for a proper analysis of this case. The Board certainly kept them separate, relying on "uncontradicted credited testi-

mony" and a past practice of "many years" (Trial Examiner's Decision, fn. 2, pp. 3, 6-8). Petitioners' brief repeatedly confuses the two concepts.

CONCLUSION

The petition should be dismissed for lateness. If the merits are considered, it should be denied.

Respectfully submitted,

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SYSTEM COUNCIL T-4, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

We invite the attention of the Court to the following facts, which show that the petition was filed out of time:

The judgment of the court of appeals (Pet. App. A2) was entered on July 19, 1971, and a petition for rehearing was denied on August 11, 1971 (Pet. App. A1). No extension of time for filing a petition for certiorari was obtained, and the petition was not filed

until November 11, 1971, 92 days after the court of appeals denied a petition for rehearing. Since the 90-day period for filing a p..ition in 28 U.S.C. 2101 (c) is jurisdictional, the petition for a writ of certiorari should be denied. See *Teague* v. *Regional Commissioner of Customs, Region II*, 394 U.S. 977; *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 427; *Williams* v. *United States*, 400 U.S. 909.

Respectfully submitted.

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DECEMBER 1971.

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Respondent.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

The Solicitor General and the Intervenor in the Court below, filed their briefs in opposition to the Petition for Writ of Certiorari and raised a question of jurisdiction. It is argued that the Petition was filed two days beyond the time limit and, therefore, the Court is without jurisdiction to entertain the Petition. As authority the Intervenor cited two cases: *Pittsburgh Towing Co.* v. *Mississippi Valley Co.*, 385 U. S. 32 and *Levine* v. *United States*, 380 U. S. 915, 967; and the Government cited three cases: *Teague* v. *Regional Commissioner of Customs, Region II*, 394 U. S. 977; *Scofield* v. *National Labor Relations Board*, 394 U. S. 423, 427; *Williams* v. *United States*, 400 U. S. 909.[1]

1. The citations of *Williams* and the *Levine* cases will not be discussed directly because these are memorandums of the court which contain no express comment on the question. However, it is interesting to speculate whether the issuance of the memorandum denying Certiorari is itself an exercise of the Court's jurisdiction.

There have been many instances in cases before this Court where the question of the Court's jurisdiction to entertain a Petition for Writ of Certiorari has been raised. Both the Court's own rules and Title 28 of the United States Code have been involved in these decisions. While the Government cites the *Teague* case, supra, as its authority, the only discussion of this question appears in the dissent by Justice Black. It is clear that any contention that this Court lacks jurisdiction because of a few days delay in filing, is without merit for the reasons enunciated by Justice Black in that case as follows:

> "The statute governing the time for seeking certiorari in a civil case, 28 U. S. C. § 2101(c), provides that a petition for review of any judgment or decree 'shall be taken or applied for within ninety days after the entry of such judgment or decree.' It is suggested by the Solicitor General, on behalf of respondents here, that this statute is 'jurisdictional,' and that we must follow it. I agree, of course, that we should follow the statute. But we must first determine what the statute means. Commentators and this Court alike have often said that the statute is 'jurisdictional,' and no doubt this statement is true in certain senses of that term. But the statement certainly is not true if it is intended to suggest that the statute deprives this Court of all power to hear cases filed after the 90-day period, regardless of whether the delay was caused by snowstorms making the transportation of the mails impossible. Under no known principle of statutory construction can such an interpretation of § 2101(c) be supported. Nor have I been able to find any case interpreting the statute in this way. Although many cases repeat the 'jurisdictional' formula, none of them that I have found involved situations where the delay was wholly caused by circumstances entirely beyond the petitioner's control. In fact, many of the early cases interpreting Rev. Stat. §§ 997, 1008, the predecessors of § 2101(c), made clear that this Court had power to waive the time

requirement of these provisions under appropriate circumstances. In recent years this Court has on occasion granted certiorari and decided on the merits civil cases that had been filed after the 90-day period, without making any mention of the time question. See, *e. g., Ray v. Pierson,* 386 U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) (No. 94, October Term, 1966).

In addition, we have squarely adopted this approach in interpreting several related statutes. The provision governing direct appeals to this Court from a district court, now § 2101(a), provides that '[t]he record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.' The Court held, under circumstances much less compelling than those present here, that this provision did not eliminate our power to hear appeals docketed after the 60-day period, noting that '[i]t would not expedite determination of constitutional questions to dismiss appeals because errors in practice.' United Public Workers of America v. Mitchell, 330 U. S. 75, 86, 67 S. Ct. 556, 91 L. Ed. 754 (1947). The cases deciding the timeliness of an appeal to the court of appeals have reached the same result under statutes that were even more clearly phrased in mandatory terms, and did not explicitly include even an indirect reference to a judicial rule-making power on the subject. E.g., Georgia Hardwood Lumber Co. v. Compania, 323 U. S. 334, 65 S. Ct. 293, 89 L. Ed. 280 (1945); R. F. C. v. Prudence Securities Advisory Group, 311 U. S. 579, 61 S. Ct. 331, 85 L. Ed. 364 (1941)." *Teague* v. *Regional Commissioner of Customs, Region II,* 394 U. S. 977, 981.

The citation of *Scofield* v. *NLRB,* 394 U. S. 423, 427 is not valid precedent because in that decision the Court entertained the petition and noted that in labor cases confusion may arise as to the exact date when the calculation of the ninety day time period should begin. The Court then concluded that the matter of the mathematical

computation is not one that should be strictly construed. Nowhere in that case, particularly at page 427 is there any statement of the conclusion that the Court lacks jurisdiction because of the provisions of 28 U. S. C. 2101.

The decision in *Pittsburgh Towing* holds that a failure to comply with Rule 13(1) of the Rules of the Court, in docketing an appeal, is the basis for exercising the Court's discretion in dismissing the appeal. However, the Court has subsequently held that this decision stands for the proposition that the time requirements of Rule 13(1) are not jurisdictional in nature. *Johnson* v. *Florida,* 391 U. S. 596, 88 S. Ct. 1713. Therefore, this citation for the contention that the Court lacks jurisdiction is not accurate because, under Rule 13 the Court may exercise its discretion in entertaining or refusing to entertain a petition. However, if Rule 22 is considered, as apparently was intended by the Intervenor's reference to 28 U. S. C. 2101(c), then other factors must be considered.

Rule 22, Subsection 3 provides that a petition for writ shall be filed in time prescribed by law. The nature of the NLRB proceedings and particularly the statutory provisions enacted by Congress to review the Court decision must necessarily be considered. In 29 U. S. C. 160(e) and (f) review is provided for from NLRB decisions either by the Board itself for an enforcement under (e) or by a party injured by the decision under (f). Subsection (f) provides that review shall be within the time limits prescribed by 28 U. S. C. 2112.

In 28 U. S. C. 2112 the authority is specifically given to the various courts of appeal to determine the time within which a request for review of the NLRB decision may be made. Thus it is clear that Congress in the matter of the appeal process in labor relation cases has provided for less than a definite time period for the appellate review. Of even greater significance is the nature of the rights arising under the National Labor Relations Act.

Petitioner submits that the nature of the cases arising under that statute have been viewed as different in nature than most other types of cases reviewed by the Court because not only private, but public rights are adjudicated. *U. A. W.* v. *Scofield* and *U. A. W.* v. *Fafnir*, 86 S. Ct. 373, 382 U. S. 205.

Finally there is a serious question as to when there exists a final order of the Board from which Subsections (e) and (f) review may be had. Should the party adversely affected by the order decline to voluntarily comply with that order, the Board under the Statute must proceed to Court for enforcement of that order and/or a contempt citation, if there is an existing order from a Court of Appeals.

Thus it is possible under the statute for the question of final judgment and, therefore, the time for review by this Court, to arise at a later time based upon an appeal from a contempt citation by the Court of Appeals. The petitioner submits that this Court has clearly held in other decisions that in order to avoid circuity and delay, it is more appropriate for the Court to review a decision on its merits than to wait for a subsequent petition which may be more within the mathematical calculation set out in the statute. *Heflin* v. *U. S.*, 358 U. S. 415 and *Taglianetti* v. *U. S.*, 394 U. S. 316. Certainly, the petitioner wishes to avoid any contempt citation to allow appellate review on the merits of the original Board order. Therefore, petitioner urges the Court to review the case on its merits at this time.

It is submitted that the petitioner in particular and the employees in general should not be denied the review because of a two-day error in calculation by the counsel for the petitioner. The reasons for the Court granting review under these circumstances is eloquently stated by Justice Black in the *Pittsburgh Towing Co.* v. *Mississippi Valley Co., supra.*

"Due to a misunderstanding among appellant's lawyers this case was not docketed nor was the record filed until 22 days after the 60-day period prescribed by this Court's Rule 13(1). The Court now, quite contrary to its recent practices, dismisses the case pursuant to Rule 14(2) because of this error of appellant's lawyers. Rule 14(2) permits, but does not require, such a harsh court order to be made. Appellant's counsel, upon reporting the misunderstanding to a member of this Court, could unquestionably have obtained an enlargement of the time to docket the case extending even beyond the 22 days within which the record was actually filed. There is no indication whatever that the appellees, their counsel or other parties with business before this Court have been injured—as the Court seems to intimate without record support—by this slight formalistic delinquency. On the contrary, the appellant is denied review of a judgment setting aside an Interstate Commerce Commission order, a type of three-judge district court judgment from which Congress has seen fit to give aggrieved persons a direct appeal to this Court. Thus, for a mere paper-filing negligence of appellant's counsel, the purpose of Congress to grant reviews of this special category of administrative orders is frustrated.

"This case is now to take its place among a growing number of others where mere procedural rules have been used to prevent the consideration and determination of cases on their merits. See *e.g.*, *Lord* v. *Helmandollar*, 121 U. S. App. D. C. 168, 348 F. 2d 780, cert. denied, 383 U. S. 928, 86 S. Ct. 929, 15 L. Ed. 2d 847, Black, J., dissenting; *Reiss* v. *Murchison*, cert. *denied*, 383 U. S. 946, 86 S. Ct. 1196, 16 L. Ed. 2d 209, Black, J., dissenting; *Link* v. *Wabash R. Co.*, 370 U. S. 626, 636, 82 S. Ct. 1386, 8 L. Ed. 2d 734, Black, J., joined by The Chief Justice, dissenting; *Beaufort Concrete Co.* v. *Atlantic States Constr. Co.*, 384 U. S. 1004, 86 S. Ct. 1908, 16 L. Ed. 2d 1018, Black, J., dissenting; *Santana* v. *United States*, 385 U. S. 848, 87 S. Ct. 74, Black, J., dissenting. I find it inconsistent with a fair system of justice to throw out a litigant's

case because his lawyer, due to negligence, or misunderstanding, or some other reason fails to satisfy one of many procedural time limits. If a pound of flesh is required because of negligence of a lawyer, why not impose the penalty on him and not his innocent client?

"As I have previously stated, 'The filing of court papers on time is, of course, important in our court system. But lawsuits are not conducted to reward the litigant whose lawyer is most diligent or to punish the litigant whose lawyer is careless. Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits.' *Beaufort Concrete Co., supra,* 384 U. S. at 1006, 86 S. Ct. at 1910, Black, J., dissenting. The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having his lawsuit tried should be resolved in favor of the citizen, not the court clerk. I would not dismiss this case for violation of Rule 13(1)." *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U. S. 32, 33.

For the above and foregoing reasons, petitioners submit that the Court has jurisdiction, and should exercise such jurisdiction to review the important question presented by the Petition.

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